Statutory tinkering: on the Senate's changes to the Law on the Polish Constitutional Tribunal

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Tomasz Tadeusz Koncewicz Mo 25 Jul 2016

The infamous law on the Polish Constitutional Tribunal of July 7 th has met with an outcry of criticism among constitutional scholars. Last week, the upper chamber of the Polish Parliament, the Senate, has introduced a number of changes to meet some of the concerns. On the whole the effort amounts to little more than statutory tinkering, though. The effect, the emasculation of constitutional control in Poland, remains unchanged.

Statutory tinkering

The changes proposed by the Senate concern the powers the draft would have given to of the President of the Republic in relation to the Court.

Firstly, the enhanced role of the President with regard to internal disciplinary proceedings of the Court was removed. There will be no requirement of the President's consent once the General Assembly of the judges decide to remove one of their own from the office (new art. 12 of the Law).

Secondly, the President of the Republic will appoint the President and the Vice-President of the Court from the list of three candidates chosen by the General Assembly, and not from the list „of at least three candidates" (new art. 16 (1) of the Law).

Thirdly, the draft allowed the President of the Court to forego the condition that the date of hearings are dependent on the order at which cases come in. To do so however, the President of the Court had to act on the motion of the President of the Republic, thus allowing the latter crucial input in the daily operation of the Court. Now, after the changes proposed by the Senate, the President of the Court is vested with the sole power to set the date for a hearing irrespective of the order at which the case was lodged at the Court's Registry. As a result, this power has become a self-standing and discretionary competence of the President of the Court. The new art. 38 (4a) of the Law provides thus that it will be triggered whenever justified by the protection of freedoms and rights of the citizens, state security or constitutional order.

Fourthly, the Court's full review is restored to cover also the competence to issue a normative act (new art. 43 of the Law), and not only the content and the procedure.

Fifthly, the Citizens' Rights Ombudsman regained its power to participate in all proceedings before the Court, not only those emanating from constitutional complaints (new art. 28 of the Law)

Much as all these changes are desired, they will not prevent the Court from plunging into constitutional paralysis. The constitutional ship will drift rather than sail and its itinerary will be drastically altered *from* the rule of law and setting constraints on the majority *to* subservience and rubber-stamping of whatever the majority of the day comes up with.

Unconstitutional defiance

The changes proposed by the Senate make no mention of the three judges constitutionally selected by the previous Sejm. The alleged good intentions of PiS ring hollow as long as these three judges are not sworn in by the President thus bringing the composition of the Court to the constitutionally mandated 15. The President's duty to swear in these judges remains on paper. It is his persistent refusal to act and discharge of his obligations that fuels the constitutional crisis. No amount of empty rhetoric (alleged fixing the Court, increasing its diversity etc.) by PiS can mask the real stakes of the constitutional foul play: do away with the Court as a viable element of the rule of law. The Senate's amendments corroborate the end-result pursued by PiS from the beginning: taking

over the Court by relentlessly pushing through the judges selected by PiS in December 2015 and immediately sworn in by the President of the Republic.

This silence is deliberate and not accidental, though, when read in the light of art. 6(7) of the Law (not touched by the Senate). This provision forces the President of the Court to allow the new judges selected by PiS in December 2015 to take up their duties. This is in clear defiance of the Court's judgment of 3rd of December, 2015. From the rule of law perspective there is simply no room for any compromise here. The Court has clearly laid the constitutional interpretation that vindicates the selection of the three judges by the previous Parliament. Any other interpretation is simply *contra legem.* As of now, Polish Constitutional Court is composed of 12 judges with three judges waiting to be sworn in. The solution to the PiS-induced constitutional crisis is immediate action on the part of the President to swear in the three judges selected the old Sejm, rather than engaging in elaborate statutory revision(s) of the Constitution. This is unconstitutional defiance at its best.

The Senate also avoided the question of the judgment of the Court of 9th March, 2016 in which the Court declared unconstitutional first draft of the Law on the Court, now largely reproduced in the new version of the Law – a judgment that the government keeps refusing to officially publish. The publication of this judgment was held by the Venice Commission to be condition *sine qua non* for any constitutional settlement. Art. 91 first sentence of the new Law provides now that "*The decisions of the Court adopted before July, 20th, 2016 in violation of the Law of 25th June, 2015 on the Constitutional Court, are to be published within 30 days of the entry into force of the Law*". As usual with PiS, the devil is in the details. The second sentence of the same article adds an important exception and states that the duty to publish will not apply to "*the Court's judgments on the normative acts which already lost binding force*". In this case Polish legislator not only sidesteps the dreaded March judgment of the Court, but creates an ominous precedent for the future. The decision as to which judgments of the Court shall be or not published is now to be taken by the Parliament by way of a statute. This flies in the face of art. 190 of the Constitution that provides in clear terms that all *lege non distinguente* judgments of the Court are to be published. As a result, art. 91 of the new Law is an unconstitutional ticking bomb.

Playing a constitutional waiting game

The main aim of the Law is to make it impossible for the Court to operate as an effective element of constitutional system of checks and balances and to cripple its review functions. This continues to be the overarching objective of the Law and the Senate's changes keep this objective intact. The tactic is clear: changes were introduced in response to external criticism and pressure and with the claim that the problem has now been fixed and everything is back to normal.

PiS gave up on the most egregiously unconstitutional elements (President's involvement in the formation of the Court and involvement of the executive in shaping the Court's docket) that it did not really need anyway. This strategy aimed at stopping the external criticism and giving PiS high moral ground by portraying it as the champion of the rule of law and the party that is truly concerned with the effective Court. With the exception of small concessions, the entire illiberal and unconstitutional reform marches full steam ahead and any appeal(s) by the President of the Court addressed to the President of the Republic to veto this Law looks like an exercise in futility.

"*Statutory tinkering*" always looks good on the surface. Only peeling away the façade of ornamental rhetoric unveils the gloomy picture, one of *relentless unconstitutional defiance* on the part of PiS. As the Law is rushed now through the Sejm under blatant disrespect for the parliamentary procedures and the objections voiced by the opposition parties, the curtain in the final act of "*the Farewell to the Polish Constitutional Court"* has just fallen.

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